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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1032

CITY OF COLUMBUS, et al.,
Petitioners,

versus

ROBERT LEONARD, et al.,
Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals, Fifth Circuit, entered on October 26, 1977 after rehearing en banc in the case styled Robert Leonard, et al., Plaintiffs-Appellants, v. City of Columbus, et al., Defendants-Appellees, No. 75-2344, on appeal from the United States District Court for the Middle District of Georgia, Columbus Division, Civil Action No. 1514.

## OPINIONS BELOW

The decision of the Court of Appeals on rehearing en banc is reported at 561 F.2d 1213. The panel opinion

which this en banc decision adheres to as published is reported at 551 F.2d 974. The opinion of the District Court is not reported. Copies of all these opinions are appended to this petition in Appendix "A", as is also the October 26, 1977 judgment of the Court of Appeals. A specially concurring opinion dated January 4, 1978, is also attached in Appendix "A" and it contains sound reasons for allowing the writ.

## JURISDICTION

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment or decree of the Court of Appeals by writ of certiorari is 28 U.S.C. §1254(1) (62 Stat.928).

## QUESTIONS PRESENTED FOR REVIEW

At least five basic jurisdictional and abstention questions arise out of this factual situation in which plaintiffs seek reinstatement in the Columbus, Georgia Police Department by way of a Civil Rights action filed during the same period of time in which they also deliberately sought and failed to obtain reinstatement in hearings before the Columbus Police Hearing Board, a quasi-judicial administrative tribunal whose decisions are directly reviewable by certiorari to the Superior Court of Muscogee County in a constitutional and statutory procedure which includes provisions for the correction of errors and for trial by jury:

1.

Is the *Rooker* doctrine that federal district courts are courts of original jurisdiction applicable in the case at bar where the thrust of the complaint is to create a



federal appellate review procedure after an adverse decision by a quasi-judicial state administrative hearing which was deliberately invoked by the federal plaintiffs prior to the time that they filed their federal complaint? (*Rooker v. Fidelity Trust Company*, 263 U.S. 413, 416 (1923) ) Yes.

2.

Is a *Pullman*-type abstention appropriate in the case at bar where a construction of a local ordinance by state tribunals which might have been favorable to the plaintiffs would have eliminated the need for a federal constitutional ruling? (*Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941) ) Yes.

3.

Is a *Burford*-type abstention appropriate in the case at bar where the requested relief would have disrupted state quasi-judicial administrative processes? (*Burford v. Sun Oil Company*, 319 U.S. 315 (1943) ) Yes.

4.

Is the *Younger* doctrine of equitable restraint appropriate in the case at bar where the federal plaintiffs requested a sort of "backhanded equity" of ordering the defendants not to refrain from reinstating plaintiffs? (*Younger v. Harris*, 401 U.S. 37 (1971) ) Yes.

5.

Should this Court accept the District Court's invitation in the interest of "Our Federalism" to require some sort of exhaustion of state remedies under the

Civil Rights Act at least to the extent of requiring those who invoke to also exhaust? Yes.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the following constitutional provisions and statutes, all of which are set out verbatim in Appendix "B".

First Amendment to the United States Constitution

Fifth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

42 U.S.C. §1981 (R.S. §1977)

42 U.S.C. §1983 (R.S. §1979)

28 U.S.C. §1331 (62 Stat. 930; 72 Stat. 415)

1976 Amended version of 28 U.S.C. §1331 (90 Stat. 2721)

28 U.S.C. §1343 (62 Stat. 932; 68 Stat. 1241; 71 Stat. 637)

28 U.S.C. §2201 (62 Stat. 964; 63 Stat. 105; 68 Stat. 890; 72 Stat. 349)

1976 Amended version of 28 U.S.C. §2201 (90 Stat. 1719)

28 U.S.C. §2202 (62 Stat. 964)

Constitution of Georgia of 1945, Article VI (Judiciary), Section IV (Jurisdiction of



Superior Courts), Paragraph V (Certiorari, Mandamus, etc.) (Ga. Code Ann. 2-3905): This same provision is contained in the 1976 Georgia Constitution in Art. VI, Sec. IV, Paragraph V codified as Ga. Code Ann. 2-3305

Ga. Code Ann. 19-101 (Code of Georgia of 1933)

Ga. Code Ann. 19-203 (1850 Ga. L., Cobb, 529; 1878-9 Ga. L. 155)

Ga. Code Ann. 19-401 (1961 Ga. L. 190, 192)

Ga. Code Ann. 19-402 (1961 Ga. L. 190, 192)

Ordinance No. 71-7 of the Columbus Code

Ordinance No. 71-154 of the Columbus Code

## STATEMENT OF THE CASE

Both the opinions of the District Court and the Court of Appeals contain accurate statements of the case. We highlight the matters relevant to this petition.

1.

This case arises from certain events during the "Summer of 1971" in Columbus, Georgia, which produced litigation appearing in *Community Action Group v. City of Columbus*, 473 F.2d 966 (5th Cir. 1973), reh. den., 475 F.2d 1404 and *Sumbry v. Land*, 127 Ga. App. 786, 195 S.E.2d 228 (1972), cert. den., 414 U.S. 1079, both cases of which ended favorably to the City or to local officials.

2.

Seven black police officers were discharged from the Columbus Police Department on May 31, 1971 as a result of their deliberately cutting off American flag insignia from their official uniforms during a picketing demonstration in front of Police Headquarters in full view of television and other news media and with the stated intention of not wearing the insignia in the future.

3.

The seven officers were and still are represented by attorneys from the American Civil Liberties Union and the following events set the stage for the present petition:

(a) June 4, 1971: Counsel for the discharged policemen write the City and state that they wish to preserve their rights to a hearing before the Police Hearing Board.

(b) June 10, 1971: Deputy Chief of Police replies that hearings will be held in the near future.

(c) June 18, 1971: The present suit is filed and is served on the Mayor of Columbus on June 24.

(d) June 24, 25, 1971: Plaintiffs receive letters advising hearings are scheduled for June 28 on the "flag" charge and various other charges: feigning sickness, unlawful picket, etc.



(e) July 9, 15, 22, 1971: All discharges are upheld by the Police Hearing Board after a delay was requested by Leonard's counsel on June 28; no state court review is sought.

(f) December, 1974: Plaintiffs request trial in U.S. District Court.

(g) February, 1975: Trial is held.

(h) April 17, 1975: District Court renders judgment against plaintiffs on jurisdictional and abstention grounds citing points of law reflected in the five basic questions previously stated.

(i) May 9, 1977: Court of Appeals, relying solely on *Moreno v. Henckel*, 431 F.2d 1299 (5th Cir. 1970), reverses District Court with instructions to decide case on its merits; decision adhered to October 26, 1977 after September 28 rehearing en banc.

4.

In recognizing the availability of state court review of the Board's decision, the District Court cited *McClung v. Richardson*, 232 Ga. 530, 207 S.E.2d 472 (1974) and the Court of Appeals cited *Ball v. Police Committee of the City of Atlanta*, 136 Ga. App. 144, 220 S.E.2d 479 (1975).

5.

The permanent members of the Board are named defendants in the federal suit which has the stated pur-

pose of disrupting the Board proceedings either by commanding a course of action or by setting aside an established decision — *but the complaint does not allege any constitutional or procedural infirmities in the Board itself.*

6.

The complaint alleges unlawful discharge because of procedural defects under city ordinances and because of federal constitutional violations.

## REASONS FOR THE ALLOWANCE OF THE WRIT

**A. The Court of Appeals has decided federal questions in a way in conflict with applicable decisions of the Supreme Court and these are important questions of federal law which should be settled by the Supreme Court.**

1.

The Court of Appeals should have decided the case at bar in the same manner as the District Court decided the case on the authority of *any* or *all* of the leading Supreme Court decisions cited in the "Questions Presented for Review."

2.

The Court of Appeals not only failed to apply the *Rooker* requirement that district courts exercise only



original jurisdiction, but it also failed to recognize the applicability of *Angel v. Bullington*, 330 U.S. 183, 189 (1947): "If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him." We see no reason not to apply *Rooker* and *Angel* simply because the present matter did not go beyond the lowest state tribunal, particularly since we can easily visualize a situation in which either Leonard or the City appealed an adverse Board decision to the Georgia judicial system and thus placed the federal District Court in the position of being an appellate tribunal over the Muscogee Superior Court, the Georgia Court of Appeals, the Georgia Supreme Court, or even the United States Supreme Court.

3.

The plaintiffs claim that a reading of the two Columbus ordinances attached to this petition requires a conclusion that their summary dismissal by the Police Chief and Safety Director was erroneous and entitles them to reinstatement. We see no difference in this situation and the *Pullman* situation where the statutory authority of the Texas Railroad Commission was considered a question for Texas courts and where a finding of "no authority" eliminates the constitutional issue. *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975) also presents a similar situation: abstention is said to be regularly ordered when state law questions underly a federal claim and concern matters peculiarly within the province of local courts. *Boehning v. Indiana State*

*Employees Assoc., Inc.*, 96 S.Ct. 168 (1975) applies *Pullman* in an employment dismissal case.

4.

In naming the three permanent Board members as defendants and in asking the District Court to enjoin all defendants "from refraining to reinstate said plaintiffs and from withholding backpay from May 31, 1971" and in finally pursuing the matter so as to attempt to overrule a long-standing decision of the Board, the plaintiffs run head-on into the *Burford* abstention doctrine requiring dismissal of federal complaints that disrupt state administrative proceedings. Both *Burford* and the subsequent similar abstention case of *Alabama Public Service Commission v. Southern Railway Company*, 341 U. S. 341 (1951) emphasize the availability of judicial review — as was found by the District Court to exist in the Georgia courts in the case at bar — as a factor in abstaining. "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights." 341 U.S. 341, 349.

5.

The equitable and declaratory nature of the requested relief call for the application of *Younger's* equitable restraint and the companion doctrine for declaratory judgments found in *Samuels v. Mackell*, 401 U. S. 66 (1971). As indicated in the preceding paragraph, the interference with state proceedings is obvious regardless of whether it is viewed prospectively or retrospectively — but the exact time sequence of the federal and state proceedings should make no difference in applying equitable restraint in light of *Hicks v. Miranda*, 422 U. S. 332 (1975) which held *Younger* applicable where state criminal proceedings begin after the filing of the federal complaint but before any proceedings of substance on the merits take place in federal court.



6.

The applicability of *Younger* to civil proceedings is now well established. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). *Juidice v. Vail*, 97 S.Ct. 1211 (1977) applies *Younger* to state contempt proceedings, and, although the panel decision below attempted to distinguish *Juidice*, we submit that the entire thrust of *Juidice* prohibits *interference* with and requires *respect* for state proceedings. "Appellees need to be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, *Gibson v. Berryhill*, 411 U.S. 64, 577, 93 S.Ct. 1689, 1697, 36 L.Ed. 2d 488 (1973) and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate." 97 S.Ct. 1211, 1218. The citation of *Gibson* is appropriate because the case at bar *does not* involve the problem of a biased administrative board which was present in *Gibson*, and the opinion in *Gibson* in discussing *Geiger v. Jenkins*, 401 U.S. 985 (1971) suggests "that administrative proceedings . . . may in proper circumstances command the respect due court proceedings." 411 U.S. 564, 576, 577.

7.

*Trainor v. Hernandez*, 97 S.Ct. 1911 (1977), decided three weeks after the panel decision, applied *Younger* to attachment proceedings brought by the Illinois Department of Public Aid to recover public assistance money alleged to have been wrongfully received. We are asking the Court today to apply *Younger* to a quasi-judicial administrative proceeding. *Trainor's* application of *Younger* to a writ of attachment issued automatically by the clerk of the court upon receipt of an affidavit and executed by the sheriff (97 S.Ct. 1911, 1914) — which is auxiliary to the underlying civil complaint (97 S.Ct. 1911, 1915) — together with the *Gibson* observation quoted in the preceding paragraph clearly suggests that *Younger* not be limited to pure judicial proceedings. If it is so limited the "eviscerating impact on many state enforcement actions is readily apparent.[9]" 97 S.Ct. 1911, 1919. Footnote 9 rejects the argument that "the attachment proceeding is not a court proceeding within the doctrine of *Younger* and *Huffman*." 97 S.Ct. 1911, 1919. The availability of certiorari to the Muscogee Superior Court and the general nature of the Police Board hearing should certainly put the present plaintiffs "in court" to the same extent as the plaintiffs in *Trainor* whose federal suit only interferred with the attachment phase of the state case.

8.

The District Court extends an invitation to adopt a rule that "They who invoke must also exhaust." *Wood v. Strickland*, 420 U.S. 308, 326 (1975) suggests such a rule: "But §1983 does not extend the right to relitigate



in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." *Bishop v. Wood*, 96 S.Ct. 2074, 2080 (1976) also suggests the rule: "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."

**B. The Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeal on the same matter.**

1.

The case at bar is in direct conflict with *McCune v. Frank*, 521 F.2d 1152, 1158 (2d Cir. 1975):

> "That we are dealing with a county police department's disciplinary proceeding rather than a state court action is of little moment. A proceeding in a state court is not a prerequisite to the applicability of *Younger*. *Schlesinger v. Councilman, supra; Geiger v. Jenkins*, 401 U. S. 985, 91 S.Ct. 1236, 28 L.Ed.2d 525 (1971), *aff'g mem.*, 316 F.Supp. 370 (N.D.Ga.1970). *Geiger* establishes that *Younger* has relevance to administrative proceedings, see *Anonymous v. Association of the Bar, supra*, 515 F.2d 427, at 432 n. 3, and the explanation of *Geiger* in *Gibson v. Berryhill*, 411 U.S. 564, 576-77, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), indicates that this applicability is subject to considerations similar to those subsequently enunciated in *Huffman, supra* and *Anonymous v. Association of the Bar, supra*."

There are two companion *Anonymous* bar cases at 515 F.2d 427 and 515 F.2d 435 (2d Cir. 1975) establishing the applicability of *Younger* to administrative proceedings, and certiorari was denied in both. 96 S.Ct. 71 and 96 S.Ct. 122 (1975).

2.

The case at bar is in direct conflict with *American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir. 1976) applying *Younger* to state bar disciplinary proceedings which are heard by the Board of Commissioners on Grievances and Discipline of the South Carolina Bar and which are reviewable by the South Carolina Supreme Court. As in the present case, the ACLU sought to block the *board proceedings* before or without even knowing that any action would be taken by the Supreme Court.

3.

The case at bar is in direct conflict with *Gibson v. New Jersey Supreme Court*, 558 F.2d 701 (3d Cir. 1977) which applies *Younger* to state attorney disciplinary proceedings, and the opinion would not appear to limit this applicability merely to matters which are pending in the *courts* even though the proceedings were pending in the New Jersey Supreme Court at the time of the federal suit.

4.

We submit the following applications of *Rooker* to illustrate the conflict among the circuits created by the Court of Appeals decision:

(a) *Reese v. Louisville Trust Co.*, 58 F.2d 638 (6th Cir. 1932): "Judicial determination of an issue by state courts cannot be con-



sidered 'state action' depriving party of property without due process of law, in contravention of Fourteenth Amendment for purpose of giving federal courts jurisdiction to review action of state courts (Const. U. S. Amend. 14)."

(b) *Fisher v. Time, Inc.*, 153 F.2d 806 (1) (7th Cir. 1946): "The circuit court of Cook County and District Court of the United States for the Northern District of Illinois, Eastern Division, are courts of concurrent jurisdiction."

(c) *Borland v. Johnson*, 88 F.2d 376 (9th Cir. 1937): "Federal District Court *held* without jurisdiction of suit for relief against conviction in state justice court for violation of alleged unconstitutional state Medical Practice Act, where question as to constitutionality of act and contention that shortening of time for appeal from conviction was unjust could have been presented in state courts".

5.

The following applications of *Pullman* illustrate the conflict:

(a) *Gonzalez v. Gonzalez*, 536 F.2d 453 (1st Cir. 1976): Federal court should abstain in civil rights action for wrongful termination of employment in view of question as to whether Puerto Rican statute authorized action of personnel director.

(b) *Shelton v. Smith*, 547 F.2d 768, 770 (2d Cir. 1976): "Since § 383(2) is susceptible to an

interpretation that a hearing is required before parental visiting rights may be terminated, and since such an interpretation would obviate the need for the federal court to consider appellant's federal constitutional claims, abstention was appropriate in this case."

(c) *Lewellyn v. Gerhardt*, 513 F.2d 184, 187 (7th Cir. 1975): An action seeking recovery of land and attacking the transfer of the land on due process and equal protection grounds: "The case before us appears to be a classic *Pullman*-type abstention case because there is presented in addition to the alleged federal claim an unsettled issue of state law which is capable of superseding altogether the federal question.[2]"

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"2. *Compare* Murdock v. City of Memphis, 87 U.S. 590, 22 L.Ed. 429 (1875), an early Supreme Court decision which involved facts amazingly similar to our case. It was held that there was an adequate independent state remedy. The Court treated this issue as preemptive. *Cf.* Miller's Executor v. Swann, 150 U.S. 132, 14 S.Ct. 52, 37 L.Ed. 1028 (1893)."

6.

The following applications of *Burford* illustrate the conflict:



(a) *Kelly Services, Inc. v. Johnson*, 542 F.2d 31 (7th Cir. 1976):

"(1) District court erred in not abstaining from deciding whether employment agencies in nature of 'temporary help companies' were subject to regulatory provisions of Illinois Private Employment Agencies Act."

"(2) Even if diversity jurisdiction is proper, abstention is appropriate when to abstain would clearly serve important countervailing interests or where there would be needless friction by unnecessarily enjoining state officials from executing state policies."

(b) *Gregg v. Winchester*, 173 F.2d 512 (9th Cir. 1949): after quoting *Burford* at page 515, the *Gregg* opinion concludes:

"So it is with the zoning regulations of the City of Los Angeles. The city, under delegated state authority, has enacted an elaborate zoning system. Of course, every portion of this system is subject to attack in the state courts wherein its constitutionality under both state and federal constitutions can be tested. Where the attack has been made in a state court, conflict and confusion is avoided and all parties are fully assured of due judicial process by following through the state's trial and appellate courts and thence to the United States Supreme Court on all federal questions."

7.

The following cases involving general principles of comity and federalism illustrate the conflict:

(a) *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975): Abstention and dismissal of federal attack on Illinois eminent domain proceeding is in order because matters were of local concern, federal constitutional questions could be raised in state courts, and state statute remained susceptible to interpretation.

(b) *Spence v. Latting*, 512 F.2d 93, 98 (10th Cir. 1975), cert. den. 96 S.Ct. 198 (1975):

> "In this action, Spence sues the same City officials or their successors on the same facts changing only his theory and remedy. Thus, in state court, he sought an order requiring a § 541 hearing; in federal court, reinstatement and money damages for failure to accord a due process hearing. Nonetheless, he alleges the same facts in all of these actions, and we think that the core of his cause of action remains the same — dismissal from employment without a due process hearing. In pursuit of this cause of action, he was perfectly free to plead and litigate his federal constitutional claims in any and all of the state court actions. Federal courts are not the exclusive forum for the redress of federal rights.[5] 'Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce,



> and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them . . .' Robb v. Connolly, 111 U.S. 624, 637, 4 S.Ct. 544, 551, 28 L.Ed. 542 (1884). See also Brown v. DeLayo, 498 F.2d 1173 (10th Cir. 1974). Only the Supreme Court is the final judge of the definition and effectuation of those rights. Indeed, Spence did assert federal constitutional claims in two of his original state court actions; but deliberately and voluntarily abandoned these claims for reasons not apparent on the record."

> "5. Under 28 U.S.C. § 1343, federal courts have original jurisdiction over §1983 actions; but this jurisdiction is not exclusive. See Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972 (1930); Long v. District of Columbia, 152 U.S.App. D.C. 187, 469 F.2d 927, 937 (1972)."

**C. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that it calls for supervision by the Supreme Court.**

1.

The concurring opinion of three judges expresses doubts about the decision itself and its reliance on *Moreno v. Henckel*, 431 F.2d 1299 (5th Cir. 1970). The City unsuccessfully pointed to distinctions between the present case and *Moreno* and suggested that it was not applicable or that if found applicable it should be overruled. Plaintiff Moreno had no established review procedure but would have had to bring an *original lawsuit* in the Texas courts to review his dismissal by City Manager Henckel who *ignored* an administrative board *advisory* recommendation for reinstatement after initial dismissal by other supervisors. There were no underlying state issues and no board hearings to disrupt, so neither *Pullman* nor *Burford* applied. *All* issues were *federal* in nature, so a federal forum was considered appropriate. *Younger* had not been decided, and some of the broad "no exhaustion" language in *Moreno* is questionable in light of *Younger* and its successors.

2.

Supervision of the Court of Appeals in order to eliminate conflict within its own circuit is called for when consideration is made of the following cases:

(a) *Dorsey v. NAACP*, 408 F.2d 1022 (5th Cir. 1969), which dismissed the federal claim of a plaintiff who had received an administrative hearing which was subject to a judicial review and which concluded that the right to reinstatement was derived from state law.



(b) *Sitton v. United States*, 413 F.2d 1386, 1389 (5th Cir. 1969), which stated that district courts have only original jurisdiction and are not appellate arms of state courts.

(c) *McDowell v. Texas*, 465 F.2d 1342 (5th Cir. 1972), cert. denied, 410 U.S. 943 which concluded that §1983 does not vest federal courts with jurisdiction over uniquely local substantive matters which would create unnecessary interference with orderly state processes.

(d) *Moore v. State Highway Department of Georgia*, 467 F.2d 944 (1972), which prevented the plaintiff from litigating the same cause of action by changing legal theories and forums.

(e) *Duke v. State of Texas*, 477 F.2d 244 (1973), cert. den. 415 U.S. 978, which applied *Younger* to state civil proceedings and emphasized the failure to use state court procedures before resorting to the federal system.

(f) *Simmons v. Jones*, 478 F.2d 321 (5th Cir. 1973), which forbids the enlistment of federal courts in efforts to enforce state law merely upon the assertion of flimsy constitutional grounds.

(g) *Williams v. Rubiera*, 539 F.2d 479, 474 (5th Cir. 1976):

"This case does not present a situation like that in *Gibson v. Berryhill, supra*, in which the Supreme Court held that a state Board of Optometry was incompetent to adjudicate the issues pending before it by reason of the members' personal interest in the case. *The obvious bias of the Board precluded the predicate of Younger's application, which otherwise would have prevented federal intervention in the state administrative proceeding to suspend and revoke licenses of individual optometrists.*" (Emphasis added in last sentence.)

## CONCLUSION

The importance of the jurisdictional and abstention questions raised in this case is obvious. They far outweigh the importance of any questions that will arise when or if the case is decided on its merits. Because the questions are so important and because the Court of Appeals decision produces confusion in our jurisprudence, we respectfully submit that it would be most unfortunate if the Supreme Court passed up this opportunity to clarify these matters.

This ___ day of January, 1978.

Eugene Hardwick Polleys, Jr.
Associate City Attorney
P. O. Box 1340
Government Center
Columbus, Georgia 31902

Attorneys for Petitioners



## CERTIFICATE OF SERVICE

I certify that I have caused to be served the necessary copies of this petition on Joel M. Gora, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016, and on Margie Pitts Hames, 794 Juniper Street, NE, Atlanta, Georgia 30309, by causing the printer to place said copies in the United States mail, postage prepaid.

This ___ day of January, 1978.

Eugene Hardwick Polleys, Jr.

## APPENDIX A

### JUDGMENT

Filed: Apr. 17, 1975

In the United States District Court
for the Middle District of Georgia
Columbus Division

ROBERT LEONARD, et al.,
Plaintiffs

versus Civil Action No. 1514

THE CITY OF COLUMBUS, et al.,
Defendants

Consistent with the opinion of the Court filed concurrently herewith, IT IS CONSIDERED, ORDERED AND ADJUDGED that the plaintiffs' prayers for relief are denied and the complaint is dismissed.

ENTERED this 17th day of April, 1975.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

OPINION

(Number and Title Omitted)

Filed: Apr. 17, 1975

This suit stems from certain events occurring during the "Summer of 1971" in Columbus, Georgia. Other groups of plaintiffs have litigated constitutional claims arising during this period, and both federal and state courts have refused to sustain their complaints. See the unpublished opinion of this Court in *Community Action Group, et al. v. City of Columbus, et al. (Civil Action No. 1528 in the Columbus Division, decided January 31, 1972)*, which decision was affirmed by the Court of Appeals for the Fifth Circuit at *473 F.2d 966 (1973)*, and rehearing denied at *475 F.2d 1404*. See also *Sumbry, et al. v. Land, 127 Ga. App. 786 (1972) (195 S.E.2d 228), cert. den. 94 S. Ct. 598*. A reading of these cases gives some insight into the turbulent local "atmosphere" which prevailed during the period referred to.

The present action was brought under the provisions of Sections 1331 and 1343 of Title 28 and Sections 1981 and 1983 of Title 42 of the United States Code. There were originally 38 plaintiffs who requested injunctive and declaratory relief with regard to alleged discriminatory employment practices by the Columbus Police Department, but at the pre-trial conference of January 16, 1975 plaintiffs' counsel abandoned these contentions and stated that the seven remaining plaintiffs, who had been discharged from the Columbus Police Department on May 31, 1971, would pursue only the relief sought in divisions 1, 2, 10



and 11 of the prayers of the complaint which seek damages for wrongful discharge and injunctive relief for reinstatement.

It should be noted at the outset that although the complaint was filed in June, 1971 it was not until December, 1974 that the plaintiffs requested that the matter be set down for trial, whereupon a pre-trial conference was promptly scheduled and the case was brought on for trial on February 10, 1975. By that time not only had 31 of the original 38 plaintiffs withdrawn from the case, but 5 of the 7 individual defendants no longer had any official connection with the City and the Police Hearing Board had passed out of existence.

Since the Court disposes of the case on jurisdictional and abstention grounds and does not reach the merits of the plaintiffs' claim, only a few basic facts need be recited.

The 7 plaintiffs, 6 of whom testified at the trial, were black police officers who were discharged from their positions in the Columbus Police Department on May 31, 1971 as a result of their action in deliberately cutting off American flag insignia from their official uniforms during a picketing demonstration in front of Police Headquarters in full view of television and other news media. The nub of the problem was not the picketing and the carrying of signs but was rather this abuse of the uniform and the plaintiffs' stated intention to continue to refuse to wear the flag patch. Police Chief B. F. McGuffey signed the May 31 discharge letter and Safety Director Joseph W. Sargis issued a concurring public statement on the same date. The Mayor of Columbus also participated in this decision.

These three officials form an executive "chain of authority" under the Charter of the Columbus Consolidated Government.

On June 4, 1971 the attorney for the plaintiffs addressed letters to defendants Sargis, Leavell and Bentley, all of whom were permanent members of the Police Hearing Board, requesting hearings before the Board with regard to the discharges as follows: "This is to advise that my client named above wishes to preserve his rights to a hearing before the Police Hearing Board. I would appreciate at least seven days prior notice of the hearing since it will be necessary for me to arrange my Atlanta court calendar so that I may be present in Columbus for the hearing." On June 9, 1971 plaintiffs' attorney addressed a letter to Mr. Sargis confirming a telephone conversation the same date with regard to the prospective hearings, stating: "We are anxious to have a hearing on these matters and request that all efforts be made to give us an early hearing date." On June 10, 1971 (which was the same day on which he received the letter immediately above referred to), defendant S. W. Brown, Deputy Chief of Police, addressed letters to each of the plaintiffs informing them that a "Police Hearing Board will be scheduled in the near future to hear your appeal and you will be notified of the time, date and place the hearing will be conducted." One June 24 and 25, 1971 Brown addressed notification letters to the plaintiffs and these letters included a number of charges in addition to the incident of May 31, and Brown's testimony at trial indicated that these charges and supporting evidence were being formulated over a period of time before and after the flag incident. The plaintiffs' complaint was filed in this Court on June 18, 1971, but was



not served on the Mayor of Columbus until June 24. Pursuant to their request, three separate hearing boards were convened in July, 1971 to hear the cases of the seven plaintiffs. At these hearings all of the plaintiffs were represented by counsel in the person of Mr. Peter Rindskopf, whose name also appears as co-counsel on the complaint filed in this Court. By its action the Board determined that none of the plaintiffs should be reinstated and they were so notified. No attempt was made by the plaintiffs to review the Board's decisions in the state courts.

It has been observed that the "Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry". *Lackawanna Police Benevolent Association v. Balen, 446 F.2d 52, 53 (2 Cir. 1971).* By attempting to invoke the jurisdiction of this Court after invoking the jurisdiction of the Police Hearing Board, the plaintiffs have sought the forbidden "second bite". They seek to relitigate the same cause of action, based on the same set of facts, merely by changing legal theories and sovereignties. They do so despite the availability of a state process of judicial review of decisions of quasi-judicial tribunals such as the Police Hearing Board. In *McClung v. Richardson, 232 Ga. 530 (207 S.E.2d 472) (1974),* in a case dealing with a decision of this same Columbus Police Hearing Board, the Georgia Supreme Court has said:

> ". . . We are of the opinion that in making its decision the board acts in a judicial or quasi-judicial capacity. Therefore, any erroneous decision by the board, which is adverse to an employee. may be reviewed by certiorari to the superior court." (p. 533)

It is not the proper function of federal district courts to review questions of fact or law to which state officials or judges have addressed themselves.

Although no reference is made in the complaint to the final decision of the Police Hearing Board (because that decision came at the conclusion of the proceedings which the plaintiffs had instituted, and this suit was filed while the proceedings were still in progress), the members of the board are named as defendants and it is clear from the prayers of the complaint and from all the evidence and argument heard by the Court in this case that the purpose of this suit is to have this Court review and reverse the action of that tribunal.

> 'The district court can not do this. The jurisdiction possessed by the District Courts of the United States is strictly original. 'A federal district court has no original jurisdiction to reverse or modify the judgment of a state court.' (citing cases) Federal courts have no authority to act as an appellate arm of the state courts. (citing cases)"
>
> *Sitton v. United States, 413 F.2d 1386, at 1389 (5 Cir. 1969).*

This Court has had previous occasion to deal with a situation of this nature. In the case of *Moore v. State*



*Highway Department of Georgia, et al., Civil Action No. 945 in the Thomasville Division (1971),* the Highway Department had instituted a condemnation proceeding to take some of Moore's property for highway uses. Moore objected to the taking in the state court proceedings and when the state court decided the question adversely to him he, instead of continuing the litigation in the state courts by way of appeal, sought to circumvent the state court decision by filing a complaint in this Court seeking an injunction by invoking the provisions of the Civil Rights Act, contending that there was a conspiracy on the part of the defendants to take his property because he was a member of the black race. This Court sustained the defendant's motion for summary judgment and dismissed the complaint, holding that the state trial and appellate procedure afforded the plaintiff a forum in which he could have asserted all of the contentions made in the federal suit and that this was only an attempt to litigate the same cause of action by changing legal theories and forums. This Court's action was affirmed by judgment of the Court of Appeals for the Fifth Circuit, *Moore v. State Highway Department of Georgia, 467 F.2d 944 (1972).*

The fact that the plaintiffs in the present case filed their action before the state tribunal had made its decision and the fact that the matter was not reviewed beyond the level of a state quasi-judicial tribunal should make no difference because of the underlying principle that federal district courts are not appellate tribunals and because of the outright irrationality of allowing jurisdiction to be conferred simply because the plaintiffs failed to present the issues to the state courts and ultimately to the United States Supreme Court.

> "If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him."
>
> *Angel v. Bullington, 330 U.S. 183, 189 (1947).*

Plaintiffs predicate their claim of wrongful discharge on constitutional grounds and on the alleged misapplication of a local ordinance which they ask this Court to construe in their prayers for relief.[1] The present federal action seeking reinstatement would have been obviated had the plaintiffs prevailed in their view before any of the four levels of state tribunals available to them — the Hearing Board, the Muscogee Superior Court on a writ of certiorari (Ga. Code Ann. §19-101), the Georgia Court of Appeals on an appeal (Ga. Code Ann. §2-3704 and §2-3708), and the Georgia Supreme Court on another writ of certiorari (Ga. Code Ann. §24-3637 and §24-4537). It was in this same type of situation that the United States Supreme Court created the classic abstention doctrine in *Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941).* In that case an order of the Railroad Commission was attacked on constitutional grounds

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1 The second prayer of the plaintiffs' complaint is as follows:

> "2. That, this Court exercise its pendent jurisdiction and Chief of Police, B. F. McGuffey be preliminarily and permanently enjoined from discharging plaintiffs Leonard, Arnold, Clark, Smith, Willis, Pearson, and White *on the grounds that he lacks the power or authority under City of Columbus Ordinance 71-7 to discharge police officers summarily as he did on May 31, 1971* and enjoin the Chief of Police, the Police Department and all other defendants from refraining to reinstate said plaintiffs and from withholding back pay from May 31, 1971." (Emphasis supplied.)



coupled with a contention that the Commission *exceeded its authority* under a state statute. The Court said:

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."
>
> . . .
>
> "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority." (pp. 500-501)

The Court concludes by saying that the District Court should have stayed its hand.

During its current term the Supreme Court has again confirmed and applied the abstention doctrine in *Harris County Commissioners Court v. Moore, 95 S. Ct. 870 (decided February 18, 1975).* What the court said in that case concerning a Texas statute could just as well be said concerning the Columbus ordinance here under attack:

"Where there is an action pending in state court that will likely resolve the state law questions underlying the federal claim, we have regularly ordered abstention. . . . Similarly, when the state law questions have concerned matters peculiarly within the province of the local courts, . . . we have inclined toward abstention. . . .

"Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong . . ."

*95 S. Ct. 870, 875, 876.*

Another form of the abstention doctrine forbidding federal disruption of state administrative processes was enunciated in *Burford v. Sun Oil Co., 319 U.S. 315 (1943)*, and the facts of the present case call for a Burford-type abstention as well as the Pullman-type abstention. In *Burford* the state had provided for determination of cases and for formulation of policy by an administrative agency with expeditious and adequate judicial review in the state courts. Instead of following the available state route, the plaintiff filed a federal complaint. In dismissing the federal action the Burford court observed that conflicts of state law interpretation almost certainly would result from intervention by lower federal courts, while if the state



procedures were followed ultimate review of federal questions could be had in the United States Supreme Court.

"Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

*319 U.S. 315, 334.*

When the question of the propriety of a federal injunction against a state regulatory order was again considered in *Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951)*, the Supreme Court continued to steer the course set in the leading case. The court observed that the plaintiff had made no showing that the Alabama procedure for judicial review of administrative orders was inadequate and no showing that the procedure prevented the court's review of federal questions unsuccessfully litigated before the state tribunals.

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights."

*341 U.S. 341, 349.*

The present case is in essence an employment dispute, involving a local regulatory scheme which is of great interest to the local government, and cases of this genre normally are appropriate for state adjudication. This Court should not serve as an instrument for the disruption of state administrative proceedings con-

ducted on matters of local concern. The courts in *Indiana State Employees Association, Inc. v. Boehning, 357 F. Supp. 1374 (S.D. Indiana 1973)* and *Surowitz v. New York City Employees' Retirement System, 376 F. Supp. 369 (S.D. New York 1974)* have reached the same conclusion, and this Court concurs in the reasoning of those cases.

Although we are not asked in this case to enjoin the state court proceedings, we consider it appropriate to recall the doctrine of "equitable restraint" discussed in *Younger v. Harris, 401 U.S. 37 (1971)* and its companion cases as additional authority for the disposition of the case at bar. At its outset, the *Younger* opinion expressed a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *401 U.S. 37, 41.* More policy is expressed shortly thereafter.

> "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts."
>
> *401 U.S. 37, 43.*

Subsequent pages discuss the requirements of irreparable injury, bad faith, and harassment for obtaining injunctive relief. The opinion also makes it clear that the opportunity to raise constitutional claims in the pending state proceeding weighs against federal interference. Although *Younger* arises in the context of a criminal proceeding, nothing in the decision precludes its application to a civil proceeding. For that matter, its policy principles — assuming they be sound — ought to *require* its application in civil proceedings. What's good for "Our Federalism" in the criminal context ought to be good also in the civil context. It appears that the Court of Appeals for the Fifth Circuit in *Duke v. State of Texas, 477 F.2d 244 (1973), cert. den. 415 U.S. 978,* has adopted this view:



> "We iterate that the *Younger* principles of equity, comity and federalism apply to federal intervention in state 'civil' as well as 'criminal' proceedings, even where the exercise of First Amendment rights is involved; two of our sister Circuits have so held, Cousins v. Wigoda, 7 Cir. 1972, 463 F.2d 603, 92 S. Ct. 2610, 34 L.Ed.2d 15 (Rehnquist, Circuit Justice); Lynch v. Snepp, 4 Cir. 1973, 472 F.2d 769."
>
> *477 F.2d 244, 248.*

Despite subsequent discussion of the connection between the civil proceeding and penal statutes, the Duke court does not indicate that it will require such a connection to exist in order to validate the above quoted holding;[2] this subsequent discussion perhaps reflects a desire to maintain the closest possible

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2 Indeed, the Court indicates in its opinion that no such connection is required, the following statement appearing at page 251 of the opinion:

"It is a time-tested rubric of our federalism that:

'Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases.' *Taylor v. Taintor, 1873, 16 Wall. (83 U.S.) 366, 370, 21 L.Ed. 287, 290.*"

kinship with the factual background of *Younger*. After this and other discussion, the Duke court then expands on the above holding:

> "Thus, the federal court here intruded itself into the processes of state litigation at a time when an adequate appellate remedy was available in the state courts. Such intrusion was improper as disruptive to the delicate balance between federal and state courts implicit in traditional concepts of comity and federalism. As representative of the dominant partner in the necessary interplay between the two sovereigns, federal courts must be especially sensitive to this balance and assiduous in its preservation . . .
>
> "The plaintiffs below made no effort to utilize orderly state court procedures before resort to the federal system. . . . Other courts have indicated that failure to pursue state appellate remedies is a factor to be considered in refusing federal intervention in an ongoing state civil proceeding. *Lynch v. Snepp, supra, 472 F.2d at 775-776*; cf. *Cousins v. Wigoda, supra, 463 F.2d at 607-608*. A party may not invoke the aid of a federal court, alleging that his state remedies are inadequate, without having first tested the sufficiency of those remedies and having found them to be wanting."
>
> *477 F.2d 244, 252.*

All that was said in *Younger* and *Duke* also has relevance to the case decided today. And since *Duke* extended *Younger* to cover a civil judicial proceeding,



we see no reason why the same principle should not apply to an administrative proceeding which is quasi-judicial in nature. It is recognized that in this case the state proceeding had not been concluded at the time the federal complaint was filed but if the plaintiffs cannot use the federal court to take a second bite at the fruit *after* it has ripened into a state court order, no principle of federalism persuades us to allow them to pluck the fruit *before* it has ripened — particularly when they themselves planted the seeds by solemnly requesting and setting into motion and participating in the procedures for obtaining a state adjudication.

The Court addresses itself to one more doctrine — exhaustion of state administrative remedies — not for the purpose of invoking it in reaching the conclusion in this case but for the purpose of recognizing its existence and the controversy which surrounds it. The United States Supreme Court has left open the question of whether plaintiffs under 42 U.S.C. §1983 must exhaust their state administrative remedies in appropriate cases. *Gibson v. Berryhill, 411 U.S. 564 (1973)*. Judge Noel in *Eqner v. Texas City Independent School District, 338 F. Supp. 931 (S.D. Texas 1972)* has written a comprehensive, lucid, and persuasive opinion to the effect that a plaintiff may not proceed under the Civil Rights Act where state administrative and judicial remedies are demonstrably adequate and available both in theory and in practice. There appears to be some conflict in the Fifth Circuit with this conclusion, not only in cases cited in *Eqner* but also in the later case of *Polk v. State Bar of Texas, 480 F.2d 998 (5 Cir. 1973)* — which held the *Younger* doctrine inapplicable in a proceeding before a grievance committee of the state bar and which case the Court

here finds distinguishable from the instant case because of the conclusion there that the grievance committee action was not a "pending matter" (page 1002, footnote 11) or was "final within the institution" (page 1003). As to this continuing dispute over the exhaustion theory, the Court today declines to enter the fray. However, the Court explicitly concludes that the remedies in the Georgia state courts and under Georgia law were both available and adequate, and, since plaintiffs in this case were already parties to a state proceeding initiated at their request, the Court also expresses the view that if the exhaustion doctrine ever receives unquestioned recognition in this circuit or in the nation, it perhaps will achieve this status in circumstances similar to those present in this case. Certainly "Our Federalism" would be well served by a doctrine which at least said "They who invoke must also exhaust".

A consideration of the foregoing compels this Court to conclude that the complaint should be dismissed. The jurisdiction of this Court is original, not appellate. This Court has no jurisdiction in this case because it cannot assume the duties of a court of review. Even if this Court had jurisdiction, the various abstention doctrines lead to the same result. The Court recognizes that district courts, particularly under *Pullman*, can retain jurisdiction and stay their hand until the state courts act. However, no purpose would be served here by such a solution. Under *Burford* dismissal is more appropriate. The long delay on the part of the plaintiffs in bringing this cause of action to trial militates against any stays or further delays. The complaint will be dismissed.



This 17th day of April, 1975.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

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Robert LEONARD et al.,
Plaintiffs-Appellants,

versus

The CITY OF COLUMBUS et al.,
Defendants-Appellees.

No. 75-2344.

United States Court of Appeals,
Fifth Circuit.

May 9, 1977.

Rehearing En Banc Granted July 1, 1977.

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN, Chief Judge, and COLEMAN and MORGAN, Circuit Judges.

COLEMAN, Circuit Judge.

Robert Leonard and thirty-seven others filed this action in the United States District Court for the Middle District of Georgia, June 18, 1971, seeking declaratory relief, equitable relief, and damages. As originally cast, the suit alleged that the defendants engaged in certain racially discriminatory employment practices. At the pre-trial conference, however, the suit was radically narrowed, leaving only seven policemen plaintiffs with claims for job reinstatement plus damages for wrongful discharge. Before trial, one of the seven remaining plaintiffs also opted out. Thus, of the original thirty-seven, we now have six left, quite a decimation of forces, to say the least.

After a three day non-jury trial in February, 1975, the District Court entered an order dismissing the complaint on jurisdictional and abstention grounds. The plaintiffs appeal, asking this Court to vacate the dismissal and to instruct the District Court to decide the case on the merits. Their position is well taken.

The turbulent events from which this case arose have been well documented in other cases. See, *Community Action Group v. City of Columbus*, 5 Cir., 1973, 473 F.2d 966, *reh. den.*, 475 F.2d 1404; *Sumbry v. Land*, 127 Ga.App. 786, 195 S.E.2d 228 (1972), *cert. den.*, 414 U.S. 1079, 94 S.Ct. 598, 38 L.Ed.2d 486 (1973).

The basic facts from which this appeal arose were:

In May, 1971, the Columbus, Georgia, police department employed approximately 318 officers, of whom fifty-two were black. Various black officers including appellants, formed the Afro-American Police League. This was the vehicle by which the black officers



presented their grievances to public officials and by which they publicized their complaint of discrimination against blacks within the police department. The group's activities included issuing a press release which criticized various police activities, holding a press conference on those charges, and formulating a petition of grievances, describing their complaints of discrimination within the department.

On May 29, 1971, a black patrolman, John Brooks, failed to appear in court as a witness and was charged with contempt. He was subsequently arrested under the Judge's order. He was also suspended indefinitely on charges of conduct unbecoming an officer and feigning sickness to avoid duty. Due to this, the seven officers picketed the police station on May 29 and 30, 1971. On May 30, a meeting was held between the disgruntled black officers and various civic leaders. Appeals were made for the patrolmen to return to work. A motion was made that they go back to work, which carried by a split vote. No bargains were apparently struck at the meeting but it was stated that an attempt would be made to confer with officials to see if a solution to the complaints could be achieved.

Later on May 30, Patrolman Leonard was called off his beat and told to report to police headquarters. When he arrived, the deputy chief read a list of charges which were to be directed against Leonard. Patrolman Clark was also called in and presented with various charges.

Upset over what they thought was unfair treatment and a violation of a "cooling off" period allegedly agreed upon, the black policemen met on the morning

of May 31 and decided to again picket the police department. Wearing their police uniforms, each of the seven policemen carried hand-lettered signs with statements such as: "We Don't Want to be Policeboys — We Want to be Policemen", and "Afro-American Police League Want (sic) Justice." Later that day, with the news media assembled in front of the station, the seven black officers publicly unstitched the United States flag emblem from their uniforms. They stated that the American flag represented liberty and justice, and they would not wear the flag until they received those things for which the flag stood.

They resumed picketing for a while, but were told to report to the police major's office. When they arrived, they were advised that they had been dismissed from the police force and were given letters explaining their dismissal. The letters stated:

> "Effective this date, May 31, 1971, you are discharged from the Columbus Police Department for violation of Section 39, paragraphs 'G' and 'R' of the General Rules of Conduct of the Police Manual, which states:
>
> "(G) Conduct unbecoming an officer which might be detrimental to the service
>
> "(R) Any other act or omission contrary to good order and discipline of the department
>
> in that you did publicly remove the American Flag from the Columbus Police Uniform while picketing in front of Police Headquarters on May 31, 1971.



> "The American Flag was made an official part of the Columbus Police Uniform by a unanimous vote of the City Commission on August 18, 1969.
>
> Very truly yours,
> B. F. McGuffey
> Chief of Police"

Later that day, the Public Safety Director held a press conference at which he read a statement which explained the actions taken by the City in dismissing the officers.[1]

---

1 I have this date instructed Chief B. F. McGuffey to dismiss from the Columbus Police Department the following officers:
Patrolman George Arnold
Patrolman J. H. Clark
Patrolman Robert Leonard
Patrolman G. L. Smith
Patrolman W. L. Pearson
Patrolman F. L. White
Patrolman V. Willis
for:

Conduct unbecoming an officer which might be detrimental to the service.

Other acts of omission contrary to good order and discipline of the department.

The Director of Public Safety, Chief of Police and Command Officers have exercised patience and forbearance concerning the conduct individually and as a group by these black officers who call themselves the Afro-American Police League.

Beginning March 26, 1971, and on various dates thereafter, these officers have repetitiously made baseless allegations of unlawful conduct, racism, and discrimination against their fellow officers, the Director of Public Safety, Chief of Police and ranking officers.

They did not present their grievances through channels prior to other public proclamations and accusations.

The F.B.I., Grand Jury, and a Special Committee appointed by the Mayor have addressed themselves to the group's discontents. This obviously has not been satisfactory to these men who are more concerned with publicity than fact.

Today they picketed the Columbus City Police Department and removed the American Flag from their uniforms. These men did not enlist in the Police Department, they do not have to wear that uniform or Flag again; they are dismissed.

As the case is now presented, the basis of appellants' complaint concerns allegations of procedural defects in the dismissals and discharge for unconstitutional reasons. At the time of the dismissals, City Ordinance No. 71-7 was in effect. This ordinance established disciplinary procedures for the Columbus Police Department. The appellants complain that their dismissals were effectuated without the procedural safeguards afforded by the ordinance.[2]

On June 4, 1971, counsel for appellants wrote the defendants, stating that the discharged patrolmen wished to preserve their rights to a hearing before the Police Hearing Board and requested seven days' notice prior to the hearings. On June 10, the Deputy Chief sent a letter to the appellants, replying that each had the right to appeal their dismissals to the Board and that the hearing would be scheduled in the near future. The letters also said that they would be notified of the date, time, and place for the hearing.

On June 18, the present suit was filed in the United States District Court.

On June 24 and 25, the appellants received letters from the Deputy Chief, advising them that their hearings were scheduled for June 28. In addition to restating the charges contained in the original letters of dismissal, these letters set forth additional charges against appellants based on conduct prior to their dis-

2 Although their complaint centers on their being dismissed before receiving a hearing, they also state that they failed to receive prior notice of the charges, did not have an opportunity to receive prior notice of the charges, did not have an opportunity to respond, and were denied the rights of confrontation and to consult with counsel.



charges.[3] At the request of Leonard's counsel, the hearing was postponed until July 9. Five other appellants received a hearing on July 15. White's hearing was held on July 22. The dismissals of Leonard and White were unanimously upheld by the Board. The remaining dismissals were upheld on four to two votes. No attempt was made by the plaintiffs to have the Board decision reviewed in the state courts, although such review is available, *Ball v. Police Committee of the City of Atlanta*, 136 Ga.App. 144, 220 S.E.2d 479, 480 (1975).

As noted, following a trial in this action, the District Court disposed of the case on jurisdictional and abstention grounds and did not reach the merits of the plaintiffs' claims. In so doing, the Court stated:

> "It has been observed that the 'Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry'. *Lackawanna Police Benevolent Association v. Balen*, 446 F.2d 52, 53 (2 Cir., 1971). By attempting to invoke the jurisdiction of this Court after in-

3 These additional charges were as follows:
Arnold: Feigning sickness to escape duty; participation in unlawful picket.
Clark: Conduct unbecoming an officer by use of profane and abusive language toward female employees of police department; participation in unlawful picket; absent from duty without leave.
Leonard: Feigning sickness to escape duty; two counts of neglect of duty; participation in unlawful picket; conduct unbecoming an officer.
Pearson: Feigning sickness to escape duty; participation in unlawful picket.
Smith: Participation in unlawful picket.
White: Conduct unbecoming an officer by pawning a stolen movie projector; participation in an unlawful picket; feigning sickness to escape duty.
Willis: Participation in unlawful picket.

> voking the jurisdiction of the Police Hearing Board, the plaintiffs have sought the forbidden 'second bite'. They seek to relitigate the same cause of action, based on the same set of facts, merely by changing legal theories and sovereignties. They do so despite the availability of a state process of judicial review of decisions of quasi-judicial tribunals such as the Police Hearing Board. (citing *McClung v. Richardson*, 232 Ga. 530, 207 S.E.2d 472 (1974)."

The second factor upon which the District Court based its opinion was that plaintiffs' claim of wrongful discharge was predicated upon constitutional grounds *and* the alleged misapplication of the local ordinance. Accordingly, had the plaintiffs prevailed before any of the four levels of state tribunals available to them there would have been no necessity for the federal action seeking reinstatement. This, said the Court, presented a classic case for the application of the abstention doctrine:

> "The present case is in essence an employment dispute, involving a local regulatory scheme which is of great interest to the local government, and cases of this genre normally are appropriate for state adjudication. This Court should not serve as an instrument for the disruption of state administrative proceedings conducted on matters of local concern."

The facts and legal issues here presented are not novel. A strikingly similar case was before this Court



in *Moreno v. Henckel*, 5 Cir., 1970, 431 F.2d 1299. In *Moreno*, a city security guard was fired for "conduct prejudicial to good order". He appealed the dismissal to the San Antonio Civil Service Committee which recommended that he be reinstated. This recommendation, however, was not followed and the City Manager upheld Moreno's dismissal. Despite the availability to Moreno of adequate state court review, he elected to file a § 1983 action in the United States District Court. This suit for injunctive relief, a declaratory judgment, and damages, alleged that he had been discharged in a procedurally defective manner for unconstitutional reasons. The District Court applied the abstention doctrine and dismissed the complaint on the ground that "a remedy was available to the plaintiffs in the Texas Courts". Id. at 1300. We reversed. In so doing we stated:

> "The fact that a state remedy is available is not a valid basis for federal court abstention.
>
> * * * *
>
> "After [Moreno's] dismissal by the City Manager, he was forced to choose between one court and another court to decide his rights under the Civil Rights Act. He made the natural choice. His case turns upon federal rights of a particularly high order.
>
> * * * *
>
> "The abstention doctrine is an exception to the litigant's choice of forum, applied 'only in narrowly limited, "special circumstances".'
>
> * * * *

"We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."

*Moreno v. Henckel, supra*, at 1300, 1307, 1309.

We doubt that this result falls afoul of the recent Supreme Court decision of *Juidice v. Vail*, ___ U.S. ___, 97 S.Ct. 1211, 51 L.Ed.2d 376 (dated March 22, 1977). Therein, the Supreme Court applied the principles of *Younger v. Harris*[4] and *Huffman v. Pursue, Ltd.*[5] to an injunction by the District Court against enforcement of contempt procedures in New York state courts. The High Court there stated that nothing more was required to invoke *Younger* than the party's *opportunity* to present their federal claims in the state proceedings (emphasis in original). *Juidice*, however, involved a writ running from a state court which had jurisdiction to issue it, not the failure to exercise a state court appeal from local administrative action.

We think *Moreno v. Henckel, supra*, teaches that the District Court should have decided this case on the merits. Accordingly, we vacate the judgment of dismissal and remand the case for a decision on the merits, the Court having already conducted a full evidentiary trial in the matter.[6]

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4 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

5 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

6 On remand, at its initial determination, the District Court may allow the record to be appropriately supplemented.



VACATED and REMANDED.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

Before BROWN, C. J., and THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Robert LEONARD et al.,
Plaintiffs-Appellants,

versus

The CITY OF COLUMBUS et al.,
Defendants-Appellees.

No. 75-2344.

United States Court of Appeals,
Fifth Circuit.

Oct. 26, 1977.

Appeal from the United States District Court for the Middle District of Georgia; J. Robert Elliott, Chief Judge.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

BY THE COURT:

The panel opinion in this case is reported, *Leonard v. City of Columbus*, 5 Cir., 1977, 551 F.2d 974.

Upon rehearing at New Orleans on September 28, 1977, the Court en banc adheres to the panel opinion as published.

The judgment of the District Court is REVERSED and REMANDED.



UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 1977

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No. 75-2344

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Dist. Ct. No. CA-1514

ROBERT LEONARD, ET AL.,
Plaintiffs-Appellants,

versus

THE CITY OF COLUMBUS, ET AL.,
Defendants-Appellees.

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Appeal from the United States District Court for the Middle District of Georgia

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Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument;

ON CONSIDERATION WHEREOF, The Court en banc adheres to the panel opinion as published; and the judgment of the said District Court is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

October 26, 1977

Issued as Mandate:

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Robert LEONARD et al.,
Plaintiffs-Appellants,

versus

The CITY OF COLUMBUS et al.,
Defendants-Appellees.

No. 75-2344.

United States Court of Appeals,
Fifth Circuit.

Oct. 26, 1977.

Specially Concurring Opinion
Jan. 4, 1978.

Appeal from the United States District Court for the Middle District of Georgia; J. Robert Elliott, Chief Judge.



Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

BY THE COURT:

The panel opinion in this case is reported, *Leonard v. City of Columbus*, 5 Cir., 1977, 551 F.2d 974.

Upon rehearing at New Orleans on September 28, 1977, the Court en banc adheres to the panel opinion as published.

The judgment of the District Court is REVERSED and REMANDED.

GEE, Circuit Judge, with whom CLARK and RONEY, Circuit Judges, join, specially concurring:

Though I agree with the court's decision, I wish to acknowledge developments in the case law since *Moreno v. Henckel*, 431 F.2d 1299 (5th Cir. 1970), lest its bare citation convey the impression that exhaustion and abstention in section 1983 suits are not issues for future argument in this circuit.

The first of these developments came less than a year after *Moreno*, with the Supreme Court's opinion in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). And although the *Younger* abstention doctrine has thus far found application only in cases concerned with the exercise of state enforcement powers, it could conceivably require federal deference whenever a strong state interest has at-

tached, as when a state court becomes substantially involved in a private action against a defendant who wishes to raise constitutional issues in federal court. *See Developments in the Law — Section 1983 and Federalism*, 90 Harv.L.Rev. 1133, 1313-14 (1977). *See also Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

The second post-*Moreno* development perhaps foretells an erosion of *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963), which established that persons suing under section 1983 need not exhaust state administrative remedies before seeking federal relief. In its later decision of *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), the Court intimated that administrative exhaustion might be appropriate in section 1983 actions when the state initiates the administrative proceeding and when the individual charged suffers no deprivation prior to the completion of that proceeding. *Id.* at 574-75, 93 S.Ct. 1689.

Finally, I note several cases, as yet of uncertain import, in which the Supreme Court has relied upon the adequacy and availability of state remedies. *See Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 1415-16, 51 L.Ed.2d 711 (1977); *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Of course, both *Ingraham* and *Paul* are explainable as attempts to limit the scope of expansively worded constitutional provisions. *See Developments*, *supra* at 1269-70. But if federal rights are to be defined with any reference to



the substantive guarantees afforded by state law, it is reasonable to conclude that federal remedies should likewise be fashioned with due consideration for the avenues of relief available in state courts and administrative tribunals. This conclusion gains strength from the Court's potentially significant statement in *Stone v. Powell* that, "[d]espite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." 428 U.S. at 494 n. 35, 96 S.Ct. at 3051.

I therefore offer this brief concurrence in the belief that the law is presently in transition here and that, since it is, resting this decision, as does the majority, on a mere citation of *Moreno*'s seven-year-old authority wrongly implies that it is static.

## APPENDIX B

### First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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### Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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### Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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**Constitution of Georgia of 1945, Art. VI, Sec. IV, Para. V.**

**Ga. Code Ann. 2-3905**

They shall have power to correct errors in inferior judicatories by writ of certiorari, which shall only issue on the sanction of the Judge, and said courts, and the judges thereof shall have power to issue writs of mandamus, prohibition, scire facias, and all other writs that may be necessary for carrying their powers fully into effect, and shall have such other powers as are, or may be conferred on them by law.

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**CHAPTER 19-1. IN WHAT CASES THE WRIT OF CERTIORARI LIES.**



**Ga. Code Ann. 19-101. When writ of certiorari will lie.**

The writ of certiorari shall lie for the correction of errors committed by justices of the peace, corporation courts or councils, or any inferior judicatory, or any person exercising judicial powers, including the ordinary, except in cases touching the probate of wills, granting letters testamentary and of administration; also from the Supreme Court to the Court of Appeals as provided by section 2-3708 (Constitution of 1945).

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**Ga. Code Ann. 19-203. To justices' courts and other inferior judicatories; petition.**

When either party in any cause in a justice's court, municipal corporation or police court, council, or any inferior judicatory, or before any person exercising judicial powers, shall be dissatisfied with the decision or judgment in such cause, such party may apply for and obtain a writ of certiorari by petition to the superior court, in which petition he shall plainly and distinctly set forth the errors complained of. On such petition being filed in the office of the clerk of the superior court, with the sanction of the judge of the circuit, or the judge of some other circuit, as provided for in section 19-202, indorsed thereon, together with the bond or affidavit, as hereinafter provided, it shall be the duty of such clerk to issue a writ of certiorari, directed to the justice of the peace of the district where the decision complained of was made, or other tribunal or person whose decision or judgment is the subject matter of complaint, requiring such justice of the peace, or other tribunal, or person to certify and

send up all the proceedings in said cause to the superior court, as directed in said writ of certiorari.

(Act 1850, Cobb, 529. Acts 1878-9, p. 155.)

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**Ga. Code Ann. 19-401. Hearing on writ; notice to opposite party; jury trial on demand.**

Certiorari causes shall be heard by the court without a jury, in term time or in vacation and in chambers or in open court, upon reasonable notice to the parties, at any time that such matters may be ready for hearing. Where traverse to the answer has been filed and jury trial demanded, said matter may be tried at any time a jury is available therefor.

(Acts 1961, pp. 190, 192.)

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**Ga. Code Ann. 19-402. Errors considered; scope of review; technical distinctions abolished.**

No ground of error shall be considered which is not distinctly set forth in the petition. The scope of review shall be limited to all errors of law, and determination as to whether the judgment or ruling below was sustained by substantial evidence. All technical distinctions heretofore existing as to what questions would be considered, such as questions concerning judgments absolutely void, or assignments of error drawing in question the legal constitution or jurisdiction of the tribunal below, are hereby abolished.

(Acts 1961, pp. 190, 192.)



**42 U.S.C. § 1981. Equal rights under the law**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

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**42 U.S.C. § 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

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**28 U.S.C. § 1331. Federal question; amount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions wherein the

matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

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**28 U.S.C. § 1331. Federal question; amount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000 computed without regard to any setoff or counterclaim to which



the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721.

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**28 U.S.C. § 1343. Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

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**28 U.S.C. § 2201. Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139. § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349.

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**28 U.S.C. § 2201. Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or



not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

As amended Oct 4, 1976. Pub.L. 94-455, Title XIII, § 1306(b)(8), 90 Stat. 1719.

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**28 U.S.C. § 2202. Further relief**

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

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AN ORDINANCE
No. 71-7

An Ordinance amending the Code of Ordinances of Columbus, Georgia, providing for disciplinary procedures for the Columbus Police Department.

THE COUNCIL OF COLUMBUS, GEORGIA, HEREBY ORDAINS:

SECTION 1.

That the Code of Ordinances of Columbus, Georgia, be and the same is hereby amended by adding to Chapter 17 thereof, a new Article III to read as follows:

"CHAPTER 17

"*ARTICLE III — DISCIPLINARY PROCEDURES*

"*Sec. 17-34. Purpose.*

"To establish procedures for the prompt and thorough investigation of alleged or suspected misconduct of commissioned officers of the Columbus Police Department, including violation of statutes, ordinances and departmental rules and orders by sworn members of the department, but specifically excluding civilian employees.

"*Sec. 17-35. Authority and Responsibility.*

"Each member of the Department will perform the duties and assume the obligations of his rank in the investigation of complaints or allegations of misconduct against members of the Department and will cooperate fully with the personnel conducting the investigation. Supervisory and Command Personnel will themselves initiate investigations when the subject complained about or observed in connection with an infraction is within the scope of their authority.

"*Sec. 17-35.1 Same — The Internal Investigation.*

"Internal investigations will be initiated by the *Deputy Chief of Police* who will exercise staff supervision over all personnel investigations, and provide information and investigative assistance to all divisions of the Department as may be required to maintain Departmental integrity. With the exception of minor infractions which Commanding Officers are expected to resolve, all alleged or suspected actions of Departmental personnel that involve the possible commission of a criminal offense, misconduct, neglect of duty, or other violation of Departmental



rules or orders must be reported to the Deputy Chief of Police. This report will be made by the Superior or Commanding Officer who first receives information of an alleged violation, even when it is believed to be unfounded. Anonymous reports will be forwarded in the same manner as those in which the complainant is identified.

"*Sec. 17-35.2. Same — Exceptions to these Requirements.*

"1. Complaints relative to difference of opinion between Police Officers and citizens over the issuance of traffic citations do not come under the purview of this order. However, where a traffic case also involves an allegation that a Police Officer was in violation of law or Departmental rules, an investigation restricted to the allegation of misconduct will be conducted in conformity with the procedures established by this Article.

"2. When an alleged or observed infraction does not involve persons outside the Department and is of a minor nature, Commanding Officers will not look to higher authority to initiate action. Such cases are the responsibility of the Commanding Officers to resolve and they will be expected to take necessary corrective action without delay. Examples of such cases include but are not limited to:

"a. Lateness.

"b. Uniform and equipment violations.

"c. Personal appearance infractions.

"d. Minor omissions in assigned duties.

"e. Minor infractions of Departmental regulations concerned with efficiency or safety.

"*Sec. 17-35.3. Same — The Deputy Chief of Police.*

"1. Make an independent investigation of a complaint; or

"2. Make a preliminary investigation and assign selected personnel to develop full facts under the Deputy Chief's supervision.

"3. Be responsible for the supervisory and expeditious completion of investigations alleging misconduct.

"4. Conduct an investigation at the request of any member of the Department who justifiably feels threatened by a false accusation or a contrived situation involving false evidence. Such members are authorized to report their situations directly to the Deputy Chief, Chief of Police and/or the Director of Public Safety without reporting to their superiors.

"5. Upon completion of sustained investigations by the Deputy Chief of Police:

(a) Mark investigation "unfounded" or "insufficient for charges".

(b) Mark investigation for disciplinary processing.



"*Sec. 17-35.4. Same — The Chief of Police.*

(A) The Chief of Police shall review and pass upon recommendations of Deputy Chief of Police as set forth in Section 17-35.3, Subparagraph 5. When the Chief of Police has passed upon the recommendations of the Deputy Chief of Police and determined that there is sufficient merit to a complaint to start a disciplinary hearing, he shall give the accused notice as set forth in Section 17-37.1 of this Article.

(B) The Chief of Police shall perform duties assigned to him for the organization of a Police Hearing Board as set forth in Section 17-37.2 of this Article.

(C) The Chief of Police shall exercise the powers as shown in Section 17-38 of this Article.

"*Sec. 17-36. Officers Rights.*

"To insure that such investigations are conducted in a manner conducive to good order and discipline, meanwhile observing and protecting the individual rights of each member of the force, the following rules of procedure hereby are established:

"1. The interrogation of any Department member shall be at a reasonable hour, preferably when the member is on duty, and during the daylight hours unless the exigencies of the investigation dictate otherwise. In the latter event, reassignment of the member's tour of duty shall be employed.

"2. The interrogation shall take place at a location designated by the investigating officer, usually at Police Headquarters.

"3. The subject of an inquiry shall be informed of the rank, name and command of the interrogating officer and the identity of all persons present during an interrogation. If a member of the Department is directed to leave his beat and report for interrogation to headquarters, his commanding officer shall be promptly notified of his whereabouts.

"4. The officer under investigation shall be informed of the nature of the investigation before any interrogation commences. Sufficient information to reasonably apprise the member of the allegations should be provided. If it is known that the member of the Department being interrogated is a witness only, he should be so informed.

"5. The interrogation shall be completed with reasonable dispatch. Reasonable respites shall be allowed. Time shall be provided also for personal necessities, meals, telephone calls, and rest periods as reasonably necessary.

"6. The member shall not be subjected to any offensive language, nor shall be threatened with transfer, dismissal, or other disciplinary punishment. No promise of reward shall be made as an inducement to answering questions. Nothing herein is to be construed as to prohibit the investigating officer from informing the member that his conduct can become the subject of disciplinary action resulting in disciplinary punishment. *Officers must cooperate fully with the investigation officer unless they are the accused.* Failure to fully assist in the investigation will make the officer subject of disciplinary action.



"7. In all cases wherein a member is to be interrogated concerning an alleged violation of the Department Rules and Regulations which, if proven, may result in his dismissal from the service or the infliction of other disciplinary punishment upon him, he shall be afforded, if he so requests, a reasonable opportunity and facilities and at least 24 hours to contact and consult privately with an attorney of his own choosing. An attorney of his own choosing may be present during the interrogation but may not participate in the investigation except to counsel the member. However, in such cases, the interrogation may not be postponed for purpose of counsel past 10:00 a.m. of the day following notification of interrogation.

"8. The complete interrogation of the officer shall be recorded mechanically or by a stenographer. There will be no "off the record" questions. All recesses called during the questioning shall be noted in the record.

"9. If an officer is under arrest or is likely to be, that is, if he is a suspect or the target of a criminal investigation, he shall be given his rights pursuant to the Miranda decision.

"10. Under the circumstances described in paragraph 7, the member shall be given an exact copy of any written statement he may execute, or if the questioning is mechanically or stenographically recorded, the member shall be given a copy of such recording or transcript if requested by him.

"11. The refusal by an officer to answer pertinent questions concerning any non-criminal matter may result in disciplinary action.

"12. Members may be requested to submit to polygraph, intoximeter, or other standard investigative examination employed. Such tests must be given if requested by the member.

"*Sec. 17-37. Disciplinary Procedure.*

"*Sec. 17-37.1. Preliminary Notification.*

"When the Deputy Chief of Police determines that there is sufficient merit to a complaint to start a disciplinary hearing he shall:

"1. Advise the accused in writing of the charges to be brought against the officer, charges may be personnally served or served by registered mail.

"2. The accused will be advised that he has a right to counsel and may call witnesses in his behalf.

"3. He shall also be afforded a hearing date within thirty (30) calendar days of the notice in the absence of unusual circumstances.



"*Sec. 17-37.2. Police Hearing Board.*

"Prior to the hearing date the accused will be advised that the charges will be heard by a police hearing board comprised of the Director of Public Safety and two civilian board members appointed by the Council of Columbus, Georgia as permanent members who may not be removed under Subsection 3 hereof and four officers of the Columbus Police Department selected by the Chief of Police.

"1. The officers must each be of equal or higher rank than the accused.

"2. The officers cannot be from the division in which the accused serves.

"3. The accused may ask that any one officer on the Board be removed without cause and Chief will provide another member.

"4. One of the civilian board members shall be appointed to serve a term ending January 1, 1972, and until his successor is named and appointed and one of the civilian board members shall serve a term ending January 1, 1973, and until his successor is named and appointed. All appointees to such board made after the initial appointments shall be for unexpired terms or for terms of two years. Civilian board appointees shall not be eligible to succeed themselves.

"5. At least five (5) members shall be present and a vote of four (4) shall be necessary for any action.

"*Sec. 17-37.3. The Hearing.*

"1. Hearings will be conducted in rooms sufficiently large to accomodate the members of the Board, the accused's attorneys, members of the news media, and representative interested parties, and such hearing shall be public.

"2. The police hearing board shall not be bound by the rules of evidence but may consider any evidence which it deems relevant or material to the subject of inquiry.

"*Sec. 17-37.4. Same — Procedure.*

"The hearing shall consist of:

"(A) *Opening statement of charges and contentions of the Police Department.* The officer accused shall have the right to present an opening statement at the time or before presenting evidence in his defense.

"(B) Presentation of Police Department evidence.

"(C) Presentation of evidence for officer accused. (Opening statement of officer may be presented prior to presentation of evidence if opening statement has not been previously made).

"(D) Presentation of evidence of Police Department strictly confined to rebuttal of officers evidence.



"(E) Closing statement. *In all cases the Police Department may present a closing statement* or may waive it and in all cases the officer accused shall have the right to present the final closing statement or may waive it.

"*Sec. 17-37.5. Same — Witnesses.*

"1. Witnesses may be called by the Police Department or the officer charged.

"2. Witness will be excluded from hearing room until needed.

"3. Either the Police Department or the officer charged shall have the right to have any witness present throughout the hearing upon showing that such witness is necessary to present the case of the Police Department or the officer charged."

SECTION 2.

The Police Hearing Board created by Section 17-37.2 of the Code of Ordinances, as amended by Section 1 of this Ordinance shall be considered a successor Board to the Board of Public Safety as it heretofore existed prior to the effective date of consolidation. Any and all cases pending before the Board of Public Safety in which appeals had been filed which were not heard prior to January 1, 1971, may be continued, heard and disposed of by the Police Hearing Board as the successor Board to the Board of Public Safety.

Introduced and read at a regular meeting of the Council of Columbus, Georgia, held on the 12th day of January, 1971; read a second time at a regular meeting of said Council held on the 19th day of January, 1971, and adopted at said meeting by the affirmative vote of nine (9) members of said Council.

Councilman Batastini voting Yes.

Councilman Binns voting Yes.

Councilman Forte voting Yes.

Councilman Illges voting Absent.

Councilman Land voting Yes.

Councilman McClung voting Yes.

Councilman McDaniel voting Yes.

Councilman Rigdon voting Yes.

Councilman Turgeon voting Yes.

Councilman Wright voting Yes.

/s/ LEMUEL H. MILLER, JR.
CLERK

/s/ J. R. ALLEN
MAYOR

Submitted to the Mayor for signature,
this the 21 day of Jan. 1971
Sec: 3-202(1)
/s/ LHM
Clerk of Council

This ordinance received, signed by the Mayor, at 9:43 o'clock A.M. on the 21st day of Jan. 1971, and became law at said time received.



Sec: 3-202(2)
/s/ LEMUEL H. MILLER, JR.
Clerk of Council

---

AN ORDINANCE
No. 71-154

An Ordinance defining responsibility of the Chief of Police regarding suspensions and dismissals prior to a hearing before a Police Hearing Board.

THE COUNCIL OF COLUMBUS, GEORGIA, HEREBY ORDAINS:

SECTION 1.

That the Code of Ordinances of Columbus, Georgia, be and the same is hereby amended by adding thereto a new Section numbered 17-38, defining the authority of the Chief of Police regarding suspensions and dismissals prior to a hearing before a Police Hearing Board, which said Section shall read as follows:

"*Sec. 17-38. Suspensions and Dismissals.*

"The Chief of Police can dismiss any officer prior to a hearing by the Police Hearing Board for:

1. Insubordination
2. Use of alcoholic beverages or drugs which are illegal while on duty

3. Gross immorality
4. Bribery
5. Conversion or gross mishandling of evidence
6. Dangerous misuse of firearms
7. Evidence of the officer's commission of a felony
8. Conduct unbecoming an officer

The Chief and officers of the rank of Sergeant and above can suspend an officer for violation of rules and regulations or conduct unbecoming an officer upon good information of such misconduct for no more than twenty-four hours without approval of the Chief, Deputy Chief, or a Major.

A. Officers will not be suspended for more than thirty (30) days unless they have been served with a warrant or are subjects of indictments."

Introduced and read at a regular meeting of the Council of Columbus, Georgia, held on the 1st day of June, 1971; read a second time at a regular meeting of said Council held on the 10th day of June, 1971, and adopted at said meeting by the affirmative vote of 10 members of said Council.

Councilman Batastini voting YES.

Councilman Binns voting YES.

Councilman Forte voting YES.



Councilman Illges voting YES.

Councilman Land voting YES.

Councilman McClung voting YES.

Councilman McDaniel voting YES.

Councilman Rigdon voting YES.

Councilman Turgeon voting YES.

Councilman Wright voting YES.

/s/ LEMUEL H. MILLER, JR.
CLERK

/s/ J. R. ALLEN
MAYOR

Submitted to the Mayor for signature,
this the day of JUN 10, 1971
Sec: 3-202(1)
/s/ LEMUEL H. MILLER, JR.
Clerk of Council

This ordinance received, signed by the
Mayor at 11:35 o'clock A.M. on the
day of JUN 11, 1971, and became
law at said time received.
Sec: 3-202(2)
/s/ LEMUEL H. MILLER, JR.
Clerk of Council

Supreme Court, U. S.
FILED
FEB 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-1032**

CITY OF COLUMBUS, *et al.*,

*Petitioners,*

—v.—

ROBERT LEONARD, *et al.*,

*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1032

CITY OF COLUMBUS, et al.,
Petitioners,

v.

ROBERT LEONARD, et al.,
Respondents.

# BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents submit this brief in opposition to show that the decision below does not conflict with applicable decisions of this Court or other circuit courts, and does not require any exercise of supervisory authority by this Court. The decision below was rendered by a unanimous court, sitting en banc, whose thirteen members, after full briefing and oral argument, ruled that the District Court's dismissal of the respondents' complaint, on jurisdictional, abstention and federalism grounds, was improper and required reversal. For the following reasons, the Court of

Appeals decision was perfectly correct, and raises no issues warranting review by this Court.

## STATEMENT OF THE CASE

In the spring of 1971, the respondents and other black police officers became concerned about discrimination in the Columbus, Georgia police department - discrimination in hiring, in disciplinary matters, in police treatment of the black community. (Pet. App. 18a-19a). When their efforts to work through channels proved unsuccessful, the respondents formed an organization called the Afro-American Patrolman's League, prepared a petition detailing their charges of discrimination, and held a press conference to communicate those grievances to the public.

Several weeks later, following the arrest of a black police officer for missing a court appearance, the respondents conducted impromptu picketing in front of the police station. The next day, after a cooling off period had presumably been worked out, two of the respondents, who were officers of the League, were nevertheless called in by police officials and told they were going to



be suspended and brought up on charges. (Pet App. 19a). Upset by what they thought was unfair treatment, the respondents met on the morning of May 31, 1971 and decided to again picket in front of police headquarters.

Accordingly, they resumed their peaceful protest in front of the police department that afternoon. They carried hand-lettered signs with statements such as, "We Don't Want To Be Policeboys - We Want To Be Policemen." As part of their protest, the respondents carefully removed a small American flag insignia from their uniforms and stated that, because the flag meant liberty and justice, they would not wear the emblems until they received those things for which the flag stood. (Pet. App. 19a-20a). The men were all off-duty at the time, and the entire episode lasted less than an hour.

Immediately thereafter, the men were called into the police station and advised that they had been summarily dismissed from the police force. They were each handed a letter stating their dismissal was for "conduct unbecoming an officer which might be detrimental to the service" and "any other act or omission contrary to good order

and discipline of the department," in that they "did publicly remove the American Flag from the Columbus Police Uniform while picketing in front of Police Headquarters on May 31, 1971." (Pet. App. 20a-21a). Later that afternoon, the Public Safety Director held a press conference at which he read a press release, charging that "these officers have repetitiously made baseless allegations of unlawful conduct, racism, and discrimination against their fellow officers, the Director of Public Safety, Chief of Police and ranking officers. They did not present their grievances through channels prior to other public proclamations and accusations." (Pet. App. 21a).

The respondents were summarily dismissed without a prior hearing, notice of charges, or an opportunity to respond. In addition, they were dismissed in violation of Columbus City Ordinance No. 71-7, which had been enacted earlier that year to create a Police Hearing Board and establish disciplinary procedures for the Department. (Pet. App. 22a, 43a-55a). The respondents contended that their dismissals were effectuated without the procedural safeguards



afforded by the Ordinance, because only the Board, not the police officials, had the power to dismiss members of the Department.

On June 4 and again on June 9, 1971, the respondents' counsel contacted police officials stating that the respondents wished to preserve their rights to a hearing before the Board. On June 10, the Deputy Police Chief replied that hearings would be scheduled "in the near future."

On June 18, 1971, this action was filed in the United States District Court for the Middle District of Georgia, on behalf of 38 black officers in the Department, seeking declaratory and equitable relief and monetary damages. As to these respondents, who had been dismissed on May 31, 1971, the complaint alleged that their dismissals violated their First Amendment rights of speech, association and petition, and their Fourteenth Amendment right to due process and equal protection. They also claimed, as a matter of pendent jurisdiction, that the manner of their dismissal was in contravention of the procedures established in Ordinance No. 71-7. The complaint sought a determination that the dismissal was unconstitutional, an injunction

requiring reinstatement and back wages, and an award of monetary damages. The complaint did not challenge or seek to enjoin the enforcement of any statute or ordinance, nor to interfere with any state judicial or administrative proceedings.

After the suit was filed, on June 24 and 25, the police officials delivered letters to the respondents advising them that Board hearings would be held on June 28. The letters restated the original charges against each respondent and then set forth a number of additional charges based on alleged conduct prior to their dismissals. (Pet. App. 22a-23a). The hearings were held in July, 1971, before the Police Hearing Board, which consisted of two permanent civilian members, four police officers, and, as presiding officer, the Safety Director who had fired the respondents. The dismissal of each of the respondents was sustained, in most cases by a divided vote of 4 to 2, with the Safety Director not voting. The respondents did not file suit in state court to review the Board's action. The Board itself was abolished in the Fall of that year, less than a year after its creation.



This action then proceeded into discovery, and was readied for trial in December 1974. A three-day trial was held in early February, 1975, with the respondents claiming that their dismissals had been unconstitutional and unlawful and seeking monetary damages and reinstatement.

At no time throughout the proceedings, from the time the complaint was filed in 1971 through the trial in February 1975, did the petitioners ever move to dismiss the complaint on jurisdictional, abstention or federalism grounds. Nor, similarly, did they ever raise any defense of res judicata.

Nevertheless, following a three-day, non-jury trial, with no motion ever made by the defendants, the District Court, sua sponte, entered its order dismissing the complaint. The essence of the ruling was as follows:

> By attempting to invoke the jurisdiction of this Court after invoking the jurisdiction of the Police Hearing Board, the plaintiffs have sought the forbidden 'second bite.' They seek to relitigate the same cause of action, based on the same set of facts, merely by changing legal theories and sovereignties. They do so despite the availability

> of a state process of judicial review of decisions of quasi-judicial tribunals such as the Police Hearing Board. (Pet. App. 5a).

Though not characterizing it as such, the District Court was clearly invoking a form of res judicata, by holding that the request for an administrative hearing and the failure to "appeal" the adverse administrative decisions to the state courts precluded the respondents from litigating any of their claims in federal court.

The District Court also held that the claimed violation of the procedures of Ordinance No. 71-7, rendered the federal action barred by the abstention doctrines of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), and Burford v. Sun Oil Co., 319 U.S. 315 (1943). (Pet. App. 12a). Similarly, the court ruled that even though "we are not asked in this case to enjoin the state court proceedings," the respondents' action was nevertheless barred by the doctrine of Younger v. Harris, 401 U.S. 37 (1971), as applied to interference with an ongoing, "administrative proceedings which is quasi-judicial in nature." (Pet. App. 12a-15a).



The respondents appealed the dismissal of their complaint, and in May, 1977, a unanimous panel of the Fifth Circuit reversed that dismissal and remanded the case for a decision on the merits, holding this case controlled by Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970), and finding nothing in this Court's extensions of the Younger doctrine which would require federal plaintiffs to seek state judicial review of local administrative action. (Pet. App. 24a-26a).

A petition for rehearing en banc was granted, argument was fully heard, and the Fifth Circuit unanimously sustained the panel's ruling. Three judges subsequently filed a special concurring opinion, joining in that result, but questioning whether the Moreno case still retained its full precedential vitality. (Pet. App. 28a-33a).

## REASONS FOR DENYING CERTIORARI

This is the classic case for federal court adjudication. The respondents are black public employees who were summarily dismissed from their official positions for criticizing the policies of the police department by which they were employed.

Claiming that such adverse administrative action violated their rights under the First Amendment, deprived them of due process of law and denied them the equal protection of the laws, they filed a Section 1983 action against the local officials seeking injunctive relief and monetary redress for what had been done. At the same time, they exhausted their available administrative remedies. When those remedies were unsuccessful, they pressed for an adjudication of their federal claims on the merits in federal court. They sought no interference with any state judicial proceeding, criminal, civil or otherwise, they asked for no injunction against, or even interpretation of, any state statute, and they did not seek to "appeal" from any state court decision. They simply sought traditional 42 U.S.C. Section 1983 relief against traditional Section 1983 defendants.

Nevertheless, the petitioners, like the District Court, invoke a variety of jurisdictional, procedural and federalism doctrines which they claim are offended by permitting a federal decision on the merits in this case. The lynchpin of their argument is that the



respondents' request for an administrative Police Board hearing irrevocably committed them to state court jurisdiction for all purposes and on all claims. There is not a single decision of this Court which supports that argument or requires that conclusion. On the contrary, all of the decisions of this Court which have dealt with the problem of adjusting federalism interests have made it clear that this case remains the paradigm for federal adjudication.

1.

Since the respondents did not seek to "appeal" to the District Court from any state judicial proceeding or decision, and did not seek to "relitigate" any matters decided against them by any state court, the doctrines announced in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and Angel v. Bullington, 330 U.S. 183 (1947), are wholly inapplicable here. Those cases involved parties who, having unsuccessfully litigated issues in state courts, then attempted to relitigate those issues in a subsequent federal proceeding, where they were met with preclusion of

their claims. Those cases applied rules and concepts of res judicata and collateral estoppel, which cannot be applied here.

First, and quite simply, the respondents never filed any suit in state court. The Police Hearing Board was an administrative agency, with none of the independence, expertise, permanence, procedures, standards, or remedies which characterize judicial bodies. The Board could not afford the respondents the full relief which they claimed, and it was abolished a few months after the respondents' hearings. This Court has characterized far more regular and established agencies as "administrative" rather than judicial. See, e.g., Gibson v. Berryhill, 411 U.S. 464 (1973) (optometry board); Withrow v. Larkin, 421 U.S. 35 (1975) (medical examining board).[1/] Similarly, the arguable availability of state court judicial review, on mandamus or certiorari, of the Board's actions cannot transform the Board itself into a judicial body for

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1/ Indeed, at trial, the petitioners themselves, as well as their attorney, characterized the Board hearings as "administrative hearings." (T. 104, 393).



purposes of res judicata or collateral estoppel. The respondents' request for a Board hearing was in no way tantamount to filing a lawsuit in court. [2/]

Second, even assuming arguendo that requesting a Board hearing was the functional equivalent of filing suit in state court, res judicata principles nevertheless cannot be employed here because res judicata is an

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2/ Nor has this Court ever suggested that where state judicial review of final administrative decisions is available, persons aggrieved by such local administrative action must pursue such state appeals and, therefore, foreclose themselves from federal court action. On the contrary, this Court has frequently adjudicated civil rights actions without requiring the plaintiff to seek state judicial review of an administrative decision. E.g., Goss v. Lopez, 419 U.S. 565 (1975); Wood v. Strickland, 420 U.S. 308 (1975); Dixon v. Love, ___ U.S. ___, 52 L.Ed. 2d 172 (1977). And this Court has recently reaffirmed the doctrine that "a federal equity plaintiff challenging state administrative action need not have exhausted his state judicial remedies." Huffman v. Pursue, Ltd., 420 U.S. 592, 609, n. 21 (1975). Any other rule, and especially the one contended for by the respondents, would only deter litigants from exhausting administrative remedies for fear that they would thereby be irrevocably committed to state court jurisdiction of all their claims.

affirmative defense which was never pleaded by the petitioners, even though they had every opportunity to do so, and must therefore be deemed waived. E.g., Blonder Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 350 (1971); Sosna v. Iowa, 419 U.S. 393, 396, n. 3 (1975); Huffman v. Pursue, Ltd., supra, 420 U.S. at 607, n. 19.

2.

The kinds of state interests protected by the Pullman abstention doctrine are wholly unaffected by the decision below. The typical case for Pullman abstention involves a challenge to the enforcement of a complex statute, whose meaning as a matter of state law is uncertain, where resolution of that underlying state law issue - usually a question of whether the statute applies to the plaintiff - will be dispositive of the federal issue and thereby obviate the need for federal constitutional adjudication. See, e.g., Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975); Boehning v. Indiana Employees Association, 423 U.S. 6 (1975).



None of these factors exists here. There was no state statute being challenged or even interpreted. The pendent state law issue - whether the petitioners had failed to comply with the procedures of their Ordinance in summarily dismissing the respondents - was only one of several claims raised by the respondents. A state court ruling that the Ordinance required a hearing prior to, rather than following, dismissal would not have obviated the respondents' claims that their dismissal violated the First Amendment, due process and equal protection, thereby entitling them to equitable relief and monetary damages.

Finally, the mere existence of state law questions does not justify invoking abstention: "It is, of course, true that abstention is not necessary whenever a federal court is faced with a question of local law...." Reetz v. Bozanich, 397 U.S. 82, 86 (1970). If the need to examine local ordinances and regulations in order to adjudicate constitutional claims were sufficient to warrant abstention, then none of the myriad suits challenging the actions of local governmental institutions, see, e.g.

Perry v. Sinderman, 408 U.S. 593 (1972); Goss v. Lopez, supra; Wood v. Strickland, supra; O'Connor v. Donaldson, 422 U.S. 563 (1975), could ever be maintained in federal court.

3.

For similar reasons, the doctrine which counsels federal court abstention to avoid interference with complex, statewide, administrative processes, involving basic state policies over natural resources or comparable matters, see Burford v. Sun Oil Co., supra; Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951), is wholly irrevelant here. There was no statewide, statutory scheme of a continuing nature, aimed at securing important public policy interests, and there was no statutorily designed mechanism, with thorough and automatic judicial review as an integral part, to administer that scheme. Rather, there was an ad hoc municipal body, with no continuing regulatory or policy-making functions, which met sporadically to consider individual cases, and which was abolished within a year of its creation. As this Court observed,



just last month, in rejecting a Burford claim:

> Unlike Burford, however, this case does not involve complex issues of state law, resolution of which would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976). And there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy. Zablocki v. Redhail, 46 U.S. Law Week 4093, 4095, n. 5 (Jan. 18, 1978).

4.

The interests served by the doctrine of equitable abstention are not involved in this proceeding.

The petitioners attempt to assimilate this case to the Younger doctrine by obscuring the critical distinction between administrative proceedings and state judicial proceedings. The central concern of the Younger doctrine is "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. at 41.

Since there was no such attempt or proceeding here, that should have ended the matter. Indeed, the Younger decision itself made clear that the doctrine did not apply to the situation here, namely, "...an injunction against allegedly unconstitutional state action (discharging the employees) that is not part of a criminal prosecution." 401 U.S. at 47, n. 4.

Moreover, despite the recent extensions of the Younger doctrine, it still remains limited to cases where a federal plaintiff is seeking (1) direct injunctive relief, (2) against ongoing state judicial proceedings, (3) of an enforcement nature, (4) brought to vindicate important state interests, (5) in the enforcement of criminal or quasi-criminal laws, or (6) in the protection of state judicial processes. None of these factors is present here. For this reason, neither Juidice v. Vail, ___ U.S. ___, 51 L.Ed.2d 376 (1977), nor Trainor v. Hernandez, ___ U.S. ___, 52 L.Ed.2d 486 (1977), casts any doubt on the respondents' right to federal adjudication of their claims. Those cases involved challenges to state judicial enforcement mechanisms in the context of



ongoing state judicial proceedings against the federal plaintiffs. In both cases, this Court rejected the efforts of federal plaintiffs to prevent state court judges or state court officials from enforcing those mechanisms against them. No case could be further from those interests than this one, with no ongoing judicial proceedings in which the respondents could raise all their federal claims, no challenge to the enforcement of state judicial mechanisms or procedures, and no effort to enjoin the enforcement of any state statute. 3/

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3/ Nor does Gibson v. Berryhill, supra, suggest that the Younger interests are threatened here. What Gibson does suggest is that where a federal plaintiff is seeking to resist adverse action by a fair and unbiased state administrative agency, it may be appropriate for the federal court to permit the administrative hearing to be concluded in order to ensure that the challenged action is final and the federal claim is thereby ripe. Here, the respondents did resort to the administrative hearing, and administrative remedies were exhaused soon after the federal suit was filed. Moreover, Gibson also made clear (1) that even Younger interests are inapplicable where, as here, the administrative procedure is structurally or institutionally defective, and (2) that in any case, the availability of judicial review, de novo or otherwise, at the conclusion of the administrative proceedings does not compel the federal plaintiff to seek such review and does not invoke Younger interests if he fails to do so.

5.

The petitioners, invoking the generalized notion of "Our Federalism," invite the Court to grant certiorari in order to rule that Section 1983 plaintiffs must exhaust their state judicial remedies as a prerequisite to their federal suit. The contention borders on the frivolous. Since Monroe v. Pape, 365 U.S. 167 (1961), this Court has consistently held that, in the absence of a pending state judicial proceeding or an unsettled and dispositive question of state law, exhaustion of state judicial remedies cannot be required. The Court reiterated these principles just last month:

> First, the District Court was correct in finding Huffman and Younger inapplicable, since there was no pending state-court proceeding in which appellee could have challenged the statute. See Wooley v. Maynard, 430 U.S. 705, 710-11 (1977). Second, there are no ambiguities in the statute for the state courts to resolve, and - absent issues of state law that might affect the posture of the federal constitutional claims - this Court has uniformly held that individuals seeking relief under 42 U.S.C. §1983 need not present their federal constitutional claims in state court before coming to a federal forum. Zablocki v. Redhail, supra, 46 U.S. Law Week at 4095, n. 5.



6.

The petitioners claim that the Fifth Circuit decision is in conflict with rulings in other circuits. The claimed conflicts are illusory.

First, there is no conflict with the decision in McCune v. Frank, 521 F.2d 1152 (2d Cir. 1975). The point of the discussion of the applicability of Younger and Gibson to pending administrative, disciplinary proceedings was that the District Court should have awaited the conclusion of those proceedings before it acted; here, there was no effort to enjoin the administrative proceedings, indeed, the respondents insisted upon them. Moreover, that discussion was dictum; the Second Circuit holding was that the District Court should consider whether the plaintiff was barred by res judicata resulting from unsuccessful state court litigation of identical issues by persons with whom the plaintiff might be in privity.

Second, many of the cases purportedly in conflict with the decision below involved the unique situation of state bar committee disciplinary proceedings against attorneys and thus the special relationship between state courts and members of their bars.

E.g., Anonymous v. Association of the Bar, 515 F.2d 427 (2d Cir. 1975); American Civil Liberties Union v. Bozhardt, 539 F.2d 340 (4th Cir. 1976); Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3rd Cir. 1977). In such cases, the proceeding itself is usually of a quasi-judicial nature, direct review by the state appellate courts is mandatory, and the disciplinary action is usually not even final until that mandatory judicial review process is complete. No such factors exist here.

Third, cases such as Gonzalez v. Gonzalez, 536 F.2d 453 (1st Cir. 1976); Shelton v. Smith, 547 F.2d 768 (2d Cir. 1976); Lewellyn v. Gerhardt, 513 F.2d 184 (7th Cir. 1975); and Kelly Services, Inc. v. Johnson, 542 F.2d 31 (7th Cir. 1976), all involve the typical Pullman abstention situation where a federal challenge to a state statute may be wholly obviated depending on the proper state law interpretation of that statute. No such possiblity was present here.



7.

Finally, the petitioners contend that certiorari should be granted because the decision below conflicts with various earlier decisions in the Fifth Circuit. We think it suffices to respond that the Court below heard this case en banc, with full briefing and oral argument, that all of the cases cited were brought to that Court's attention, and that all thirteen judges joined in the decision, including the three concurring judges who only questioned the current reach of one earlier Fifth Circuit case. Finally, the Fifth Circuit has more recently considered similar issues in an en banc case, and has once again unanimously rejected a claim that federalism principles warrant abstention from deciding constituitonal questions. The language used there perfectly sums up the situation here:

> The Younger principles simply are not what the defendants would have them be: a broad, discretionary, device for the evasion of the responsibility of federal courts to protect federal rights from invasion by state officials. Morial v. Judiciary Commission of the State of Louisiana, 565 F.2d 295, 299 (5th Cir. 1977)(en banc).

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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February 28, 1978